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7590	09/29/2005		EXAMINER	
Schwegman, Lundberg, Woessner & Kluth, P.A. P.O. Box 2938 Minneapolis, MN 55402			LEE, PHILIP C	
			ART UNIT	PAPER NUMBER
			2154	
DATE MAILED: 09/29/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	09/884,674	CHU ET AL.
Examiner	Art Unit	
Philip C. Lee	2154	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on 29 August 2005.

2a) This action is **FINAL**. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1 and 3-30 is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1 and 3-30 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892)
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
 Paper No(s)/Mail Date _____

4) Interview Summary (PTO-413)
 Paper No(s)/Mail Date. _____

5) Notice of Informal Patent Application (PTO-152)
 6) Other: _____



1. This action is responsive to the amendment and remarks filed on August 29, 2005.
2. Claims 1 and 3-30 are presented for examination and claim 2 is canceled.
3. The text of those sections of Title 35, U.S. code not included in this office action can be found in a prior office action.

Claim Rejections – 35 USC 101

4. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

5. Claims 8, 12, 15, 18, 21 and 28 rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter (i.e. a computer-accessible medium, a computer data signal embodied in a carrier wave and a computerized method).

Claim Rejections – 35 USC 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are

such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 1, 3-16, 18-20 and 25-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens et al, U.S. Patent 6,606,643 (hereinafter Emens) in view of Ramanathan et al, U.S. Patent 5,913,041 (hereinafter Ramanathan)
8. Emens and Ramanathan were cited in the last office action.
9. As per claim 1, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:
determining an empirical measurement of a performance of each of the plurality of sources (col. 3, lines 47-58);
selecting a source in reference to the empirical measurement of the performance of each of the plurality of sources (col. 3, line 66-col. 4, line 3); and
initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).
10. Emens did not teach that determining including obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party sources. Ramanathan taught the method comprising determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

11. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

12. As per claims 8, 10 and 18, Emens taught the invention substantially as claimed for managing a plurality of sources, wherein executable instructions capable of directing a processor to perform:

determining an empirical measurement of a throughput speed of each of the plurality of sources (col. 3, lines 47-58);

selecting a source in reference to the empirical measurement of the throughput speed of each of the plurality of sources (col. 3, line 66-col. 4, line 3) (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to the specification, page 17, lines 1-7, if the size of the transmission and response is equal for each source tested.) ; and

initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

13. Emens did not teach that determining including obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party sources. Ramanathan taught the method comprising determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

14. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

15. As per claim 12, Emens taught the invention substantially as claimed for managing a plurality of sources which, when executed by a processor, cause the processor to perform the method of:

determining an empirical measurement of a download speed of each of the plurality of sources (col. 3, lines 27-58);
selecting a source in reference to the empirical measurement of the download speed of each of the plurality of sources (col. 3, line 66-col. 4, line 3); and
initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64). Note that the download speed

could be the throughput speed (i.e. or could be the throughput time if the size of the transmission and response is equal for each source tested according to the specification on page 17, lines 1-7) according to the specification, page 13, lines 1-4.

16. Emens did not teach that determining including obtaining an empirical measurement of a download speed of each of the plurality of sources from at least one third-party sources.

Ramanathan taught the method comprising determining an empirical measurement of a download speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

17. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of determining an empirical measurement of a download speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

18. As per claim 25, Emens taught the invention substantially as claimed for managing sources in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22) comprising:
a processor (inherently comprised); and

software means operative on the processor for determining an empirical measurement of a throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66-col. 4, line 3);

the software means selecting a source in reference to the empirical measurements of the throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66-col. 4, line 3); and

a transmitter to initiate a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

19. Emens did not teach the software means including obtainner means to obtain an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source. Ramanathan taught the system comprising software means including obtainner means to obtain an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

20. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by

allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

21. As per claim 28, Emens taught the invention substantially as claimed comprising:
 - a determiner (e.g. the calibration applets) of an empirical measurement of a throughput speed of each of the plurality of download peer-to-peer network sources (i.e. data can be exchanged freely between two computer) (col. 4, lines 19-22; col. 7, lines 44-54);
 - a selector (e.g. the calibration manager) of a source in reference to the empirical measurement of the throughput speed of each of the plurality of peer-to-peer network sources (col. 7, lines 44-54); and
 - a transmitter to initiate a download of data to a download source of the plurality of peer-to-peer network sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).
22. Emens did not teach that determining including obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party sources. Ramanathan taught the method comprising determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).
23. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's

teaching of determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

24. As per claim 3, Emens and Ramanathan taught the invention substantially as claimed in claim 1 above. Ramanathan further taught obtaining an empirical measurement of a throughput speed of each of the plurality of sources from a local source (col. 3, lines 43-58; col. 6, lines 38-49). (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to the specification, page 17, lines 1-7, if the size of the transmission and response is equal for each source tested.)

25. As per claim 4, Emens and Ramanathan taught the invention substantially as claimed in claim 1 above. Ramanathan further taught that the performance includes throughput speed (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

26. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's method of obtaining the throughput speed would increase the accuracy of Emens's system by providing a measure rate at which data is transferred between server system and a remote personal computer of a subscriber (col. 1, lines 60-65).

27. As per claims 5, 14 and 27, Emens and Ramanathan taught the invention substantially as claimed in claims 1, 12 and 25 above. Emens further taught wherein the performance comprises latency (col. 3, lines 55-56).

28. As per claim 6, Emens and Ramanathan taught the invention substantially as claimed in claim 5 above. Emens further taught wherein the determining the empirical measurement further comprises:

measuring the elapsed time of a transmission involving each of the plurality of sources (col. 3, lines 56-58).

29. As per claims 7, 11, 13 and 20, Emens and Ramanathan taught the invention substantially as claimed in claims 5, 10, 12 and 18 above. Emens and Ramanathan further taught wherein the determining the empirical measurement further comprises for each of the plurality of sources:

recording transmission time from the current time and date (see Ramanathan, col. 5, lines 52-62);

initiating a transmission to a download source of the plurality of sources (see Emens, col. 3, lines 49-51);

receiving a response to the transmission from the source (see Emens, col. 3, lines 51-53); recording the receipt time from the current date and time (see Ramanathan, col. 5, lines 52-62); and

determining the throughput speed of the source from the difference between the receipt time and the transmission time (see Emens, col. 3, lines 56-58; col. 5, lines 42-49).

30. As per claim 9, Emens did not teach comprising a download speed. Ramanathan taught wherein the throughput speed further comprises a download speed (col. 2, lines 9-13).

31. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's method of obtaining the throughput speed would increase the accuracy of Emens's system by providing a measure rate at which data is transferred between server system and a remote personal computer of a subscriber (col. 1, lines 60-65).

32. As per claim 15, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:

storing transmission time from the current time (col. 5, lines 42-45);
initiating a transmission to a download source of the plurality of sources (col. 3, lines 45-51);
receiving a response to the transmission from the source (col. 3, lines 51-53);
storing the receipt time from the current time (col. 5, lines 42-45);
determining the latency of the source from the difference between the receipt time and the transmission time (col. 3, lines 56-58; col. 5, lines 42-49);
selecting a source in reference to the latency speed of each of the plurality of sources (col. 3, line 66-col. 4, line 3); and

initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

33. Emens did not teach including a date with the transmission time or the receipt time.

Ramanathan taught the method of recording the time and date (col. 5, lines 52-62).

34. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of recording the transmission date and receipt date would increase the alertness of Emens's system by allowing a user to monitor the transaction with the external network.

35. As per claims 16 and 19, Emens and Ramanathan taught the invention substantially as claimed in claims 15 and 18 above. Emens further taught wherein source further comprises a source in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22).

36. As per claim 26 Emens and Ramanathan taught the invention substantially as claimed in claim 25 above. Emens further taught wherein the throughput speed further comprises a round-trip time (col. 5, lines 48-49).

37. As per claim 29, Emens and Ramanathan taught the invention substantially as claimed in claim 28 above. Emens further taught comprising:

a transmitter (e.g. the calibration applets) to transmit a message to a download source of the plurality of sources (col. 3, lines 49-51);
a recorder (e.g. timer) of the time of a transmission of a message, operably coupled to the transmitter (col. 5, lines 42-45);
a receiver of a response to the transmission from the source, operably coupled to the transmitter (col. 3, lines 51-53);
a recorder (e.g. timer) of the time of receipt of a response (col. 5, lines 42-45); and
a determiner (e.g. the calibration manager) of the throughput speed of the source, from the difference between the receipt time and the transmission time (col. 3, lines 56-58; col. 5, lines 42-49).

38. Claims 17, 21-24 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens and Ramanathan in view of Andrews et al, U.S. Patent Application Publication 2002/0038360 (hereinafter Andrews).

39. Andrews was cited in the last office action.

40. As per claim 17, Emens and Ramanathan taught the invention substantially as claimed in claim 15 above. Emens and Ramanathan did not specifically detailing the establishment of the socket connection comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message. Andrews taught wherein the transmission further comprises a

TCP/IP synchronized idle message (page 4, paragraph 47); and the response further comprises a TCP/IP acknowledgment message (page 4, paragraph 47).

41. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message would increase the capability of Emens's and Ramanathan's systems by allowing establishment of a socket connection for accessing content on the server.

42. As per claim 21, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:

obtaining a list comprising a plurality of identification of sources (col. 3, lines 38-46); initiating a plurality of connections, the plurality of connections further comprising one connection for each of the plurality of sources, yielding a plurality of initiated connections (col. 3, lines 48-51); receiving a response for the each of the plurality of initiated connections, yielding a plurality of responses (col. 3, lines 51-53); selecting the fastest source of the plurality of sources in reference to a predetermined file size and in reference to the response (col. 3, line 66-col. 4, line 3); and (Note: It is inherent that the HTTP request must be in reference to a predetermined file size)

initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

43. Emens did not teach obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party sources. Ramanathan taught the method comprising obtaining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

44. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source would increase the alertness of Emens's system by allowing throughput monitoring that provides a means for evaluating the performance of the system and the performance of the connection to individual remote sites (col. 4, lines 64-67).

45. Emens and Ramanathan did not teach socket connections. Andrews taught socket connections (i.e. three way handshake) could be measured for client accessing a content server (page 4, paragraphs 46 and 47). Note that it is inherent that a three-way handshake is to establish socket connection between a client and a server. The three-way handshake includes initiating a socket connection by using a synchronization (SYN message) and receiving a response (ACK message) for the initiated socket connection.

46. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of Emens's and Ramanathan's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

47. As per claim 22, Emens, Ramanathan and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises: selecting the source associated with the response that is received first (col. 3, lines 47-58; col. 3, line 66-col. 4, line 6).

48. As per claim 23, Emens, Ramanathan and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises: measuring the latency of each of the plurality of sources (col. 3, lines 47-58); and selecting a source in reference to the download speed of each of the plurality of sources (col. 3, line 66-col. 4, line 6).

49. As per claim 24, Emens taught the invention substantially as claimed wherein measuring the latency further comprises: storing the time of each of the plurality of initiating connection (col. 5, lines 42-45); storing the time of each of the plurality of responses (col. 5, lines 42-45); and

determining the download speed of each of the plurality of sources from the differences in time between the time of each of the plurality of the responses and the time of each of the plurality of the initiating connections (col. 3, lines 56-58; col. 5, lines 42-49). Note that the download speed could be the throughput speed (i.e. or could be the throughput time if the size of the transmission and response is equal for each source tested according to the specification on page 17, lines 1-7) according to the specification, page 13, lines 1-4.

50. Emens did not teach including a date with the transmission time or the receipt time. Ramanathan taught the method of recording the time and date (col. 5, lines 52-62).

51. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of recording the transmission date and receipt date would increase the alertness of Emens's system by allowing a user to monitor the transaction with the external network.

52. Emens and Ramanathan did not teach socket connections. Andrews taught socket connections (i.e. three way handshake) could be measured for client accessing a content server (page 4, paragraphs 46 and 47).

53. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of

Emens's and Ramanathan's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

54. As per claim 30, Emens and Ramanathan taught the invention substantially as claimed in claim 28 above. Emens and Ramanathan did not specifically detailing the establishment of the socket connection comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message. Andrews taught wherein the transmission further comprises a TCP/IP synchronized idle message (page 4, paragraph 47); and the response further comprises a TCP/IP acknowledgment message (page 4, paragraph 47).

55. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message would increase the capability of Emens's and Ramanathan's systems by allowing establishment of a socket connection for accessing content on the server.

56. Applicant's arguments with respect to claims 1 and 3-30, filed 8/29/05, have been fully considered but are not deemed to be persuasive.

57. In the remark applicant argued that

(1) the cited prior art do not teach downloads transmissions from a server to a user level target.

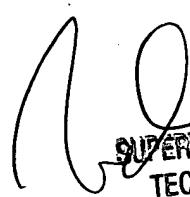
58. In response to points (1), applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., downloads are transmission from a server to a user level target) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). In addition, Emens taught the invention substantially as claimed in claim 1 comprising the step of initiating a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

59.

60. A shortened statutory period for reply to this Office action is set to expire THREE MONTHS from the mailing date of this action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Philip C Lee whose telephone number is (571)272-3967. The examiner can normally be reached on 8 AM TO 5:30 PM Monday to Thursday and every other Friday. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Follansbee can be reached on (571)272-3964. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished

applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

P.L.



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